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2000

Defamation Per Se: Defamation by Mistake?

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Publication Information

27 William Mitchell Law Review 779 (2000)

Repository Citation

Steenson, Michael K., "Defamation Per Se: Defamation by Mistake?" (2000). *Faculty Scholarship*. Paper 71.
<http://open.mitchellhamline.edu/facsch/71>

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Abstract

Defamation is a complicated tort, due in part to the differing rules that govern libel and slander, the two branches of the tort. The focus of this essay is on “defamation per se,” its origins in Minnesota, and the consequences of its misapplication. The essay opens with a short statement of standard defamation principles, followed by a short statement of the prevailing United States Supreme Court decisions, imposing First Amendment limitations on common law defamation claims, and the Minnesota cases that follow them. The next part analyzes a string of Minnesota cases that establish the foundation for Minnesota defamation law, including cases where the term “defamation per se” is introduced by the Minnesota Supreme Court. It then moves to an analysis of more recent defamation cases that incorporate the defamation per se concept, although perhaps with a mistaken understanding of what the term meant in earlier cases. The last part asks whether the result is anything other than a solecism and whether the result is independently justified even if it is.

Keywords

defamatory per se, slander, actionable per se, slander per se, first amendment, special damage, special harm

Disciplines

Constitutional Law | Torts

DEFAMATION PER SE: DEFAMATION BY MISTAKE?

Mike Steenson[†]

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I. INTRODUCTION

Defamation is a complicated tort, due in part to the differing rules that govern libel and slander, the two branches of the tort. The usual common law rule is that libel, typically defamation embodied in a permanent form, is actionable without proof of special damages, but that slander, essentially an oral communication, requires proof of special damages unless the defamatory statement falls within certain common law categories of slander per se. If a plaintiff in a slander action is unable to prove either special damages or slander per se, the plaintiff is barred from recovery. Problems, however, arise when slander terminology transmogrifies into libel law, blurs the distinctions between the two branches of the tort of defamation, and creates a hybrid tort of “defamation per se” that binds libel law by slander per se limitations. The focus of this essay is on “defamation per se,” its origins in Minnesota, and the consequences of its misapplication.

The essay opens with a short statement of standard defamation principles, followed by a short statement of the prevailing United

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States Supreme Court decisions, imposing First Amendment limitations on common law defamation claims, and the Minnesota cases that follow them. The next part analyzes a string of Minnesota cases that establish the foundation for Minnesota defamation law, including cases where the term "defamation per se" is introduced by the Minnesota Supreme Court. It then moves to an analysis of more recent defamation cases that incorporate the defamation per se concept, although perhaps with a mistaken understanding of what the term meant in earlier cases. The last part asks whether the result is anything other than a solecism and whether the result is independently justified even if it is.

The last question concerns the potential responses to the problem. There are at least three alternatives in addressing the issue. One is to let the mistake stand and ignore it. The second is to recognize and amend the mistake. The third alternative may be a broader reformatting of defamation law that promotes consistency in defamation law other than through an illogical defamation per se claim. Given the obvious constraints on judicial reform, the most obvious response, putting constitutional restrictions aside, is to require plaintiffs in all defamation cases to prove actual damages, irrespective of whether the claim is based on libel or slander.

II. THE COMMON LAW OF DEFAMATION

The standard common law rule is that all libel is actionable per se.¹ That means that libels are actionable without proof of actual or special damage. Damages, including injury to reputation and emo-

1. DAN B. DOBBS, *THE LAW OF TORTS* § 409, at 1144 (2000); RESTATEMENT (SECOND) OF TORTS § 569 (1977), states that "[o]ne who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication." Section 621 of the Restatement states that "[o]ne who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed." *Id.* § 621. Section 621 is followed by a Caveat:

The Institute takes no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.

Id., Caveat.

The English rule is that libel is actionable without proof of special damage. SIR ROBERT L. MCEWEN AND PHILIP S. C. LEWIS, *GATLEY ON LIBEL AND SLANDER* 74 (7th ed. 1974).

tional harm, are presumed.² Libel is actionable per se, meaning that even if a libel is not clear on the face of the publication, it is still actionable without proof of special or actual damages.³

2. CALIFORNIA JURY INSTRUCTIONS—CIVIL, BOOK OF APPROVED JURY INSTRUCTIONS, BAJI 7.10.1 (8th Ed., 2000 Rev.), suggests the following jury instruction for presumed damages:

Presumed damages are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include, but are not limited to, reasonable compensation for loss of personal [or professional] reputation, shame, mortification, and hurt feelings. No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.

Id. The instruction makes it clear that the damages award is left to the jury. No proof of actual damages is required.

3. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court imposed a limitation on recoverable damages on private defamation plaintiffs involved in matters of public concern. The Court required proof of “actual injury,” but without defining the term:

It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define “actual injury,” as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Id. at 349-50 (emphasis added). “Actual injury” certainly includes, but is not limited to, the type of special damage necessary to support a slander action where the slanderous comments do not fall into one of the four slander per se categories. If a private plaintiff subject to the *Gertz* rules establishes *New York Times Co. v. Sullivan* “actual malice,” however, the plaintiff will be entitled to presumed damages, if the common law rules permit them.

Two things are evident from the Court’s position on damages. The first is that “actual injury” is not limited to “out-of-pocket loss,” or “special” damages. The second is that there is no specific definition of the term “actual injury.” According to the Court, the wide experience of trial courts will enable them to figure out how to instruct juries. The Court suggested that the kinds of actual harm that may provide the basis for a damages award include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *Id.* Juries will need appropriate instructions on those issues, and any damages award will have to “be supported by competent evidence concerning the injury,” although, the Court cautioned, “there need be no evidence which assigns an actual dollar value to the injury.” *Id.*

Slander, on the other hand, is actionable without proof of special damages if the slanderous statement fits within one of the categories of slander per se. Section 570 of the Restatement (Second) of Torts sets out the usual position:

One who publishes matter defamatory to another in such a manner as to make the publication a slander is subject to liability to the other although no special harm results if the publication imputes to the other:

- (a) a criminal offense, as stated in § 571, or
- (b) a loathsome disease, as stated in § 572, or
- (c) matter incompatible with his business, trade, profession, or office, as stated in § 573, or
- (d) serious sexual misconduct, as stated in § 574.⁴

Or, as stated by the Minnesota Supreme Court in *Anderson v. Kammeier*,⁵ slander per se includes, "charges of a crime, imputations of a loathsome disease, and unchastity," as well as "imputations affecting a person's conduct of business, trade, or profession."⁶ Statements falling into those categories "are actionable without proof of special damage."⁷

If the slanderous statement does not fit within one of the slander per se categories, the plaintiff will still be entitled to presumed damages upon proof of "special damage." The term "special damage" has its own meaning in defamation law. The Restatement (Second) of Torts uses the term "special harm," which it defines as follows:

[T]he loss of something having economic or pecuniary value. In its origin, this goes back to the ancient conflict of jurisdiction between the royal and the ecclesiastical courts, in which the former acquired jurisdiction over some kinds of defamation only because they could be

4. RESTATEMENT (SECOND) OF TORTS § 570 (1977). The English rule is the same. SIR ROBERT L. McEWEN AND PHILIP S. C. LEWIS, *GATLEY ON LIBEL AND SLANDER* 74 (7th ed. 1974); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 391 (2d ed. 1981). For short histories of defamation law in England, see THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 483-502 (1956).

5. 262 N.W.2d 366 (Minn. 1977).

6. *Id.* at 372. The reason why the slander per se categories, developed in England, were confined in the sixteenth and seventeenth centuries "lies in the flow of litigation. The extent of this can be seen only from the plea rolls, where a surprising proportion of the weary annual miles of parchment is taken up with actions for words." S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 386 (2d ed. 1981).

7. *Anderson*, 262 N.W.2d at 372.

found to have resulted in “temporal” rather than “spiritual” damage. The limitation has persisted in the requirement that special harm, to serve as the foundation of an action for slander that is not actionable per se, must be “temporal,” “material,” “pecuniary” or “economic” in character.

The more modern decisions have shown some tendency to liberalize the old rule, and to find pecuniary loss when the plaintiff has been deprived of benefit which has a more or less indirect financial value to him. Thus the loss of the society, companionship and association of friends may be sufficient when their hospitality or assistance has been such that it can be found to have a money value. The tendency has been in the direction of finding an indirect benefit to be sufficient.⁸

Depending on the jurisdiction, there may be variations on the general defamation rules. A court may take the position that libelous statements not clear on their face are libels per quod, and therefore not actionable without proof of special or actual damage, unless the defamatory statement fits in one of the slander per se categories.⁹ Or, a court may decide that libel claims should be sub-

8. RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

9. Laurence H. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); William L. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966). The debate between Mr. Eldredge and Professor Prosser is interesting because of the detail with which they dissect the available authority on the issue. Grasping the issue is difficult, but this is the way Professor Prosser sees it:

The question at issue is illustrated by the following case: the defendant publishes an apparently innocent article, containing nothing in any way defamatory, saying that the plaintiff is a bachelor. There are readers, however, who know extrinsic facts: that he is living with a woman who purports to be his wife, and has three children. They are led by these facts to draw the defamatory conclusion, or innuendo, that he is not married to the woman and is guilty of immoral conduct. Can he recover for libel, without proof of special damages, in any case where he would not recover if the utterance were slander? In other words, can he recover without such proof in any case which does not fall within the four traditional categories of slander actionable per se—imputations of crime, of loathsome disease, of unchastity to a woman, or which affect the plaintiff in his business, profession, trade, office, or calling. Mr. Eldredge says yes; I have said that the American cases, in general, hold otherwise.

Prosser, 79 HARV. L. REV. at 1629-30 (citation omitted). In his article, Mr. Eldredge sets out the basis for the confusion in terminology:

Before proceeding to an analysis and classification of the various decisions, it is necessary to point out that the rule of “libel per quod” was spawned by confusion over such terms as “actionable per se,” “libel per se,” “slander per se,” “per quod,” and “innuendo,” in courts that had no clear understanding of the law of defamation, its historical background,

and the frequently silly distinctions drawn between slander and libel. At common law, an action on the case was an action to recover the actual damages caused by the defendant's conduct. The Latin expression "per quod," meaning "whereby," traditionally introduced the specification of damages incurred—a necessary element for an action on the case. Actions that required this "per quod" allegation of damages came to be known as "actionable per quod." Actions that did not require it, for example, trespass quare clausum fregit, were called "actionable per se."

The English common law sharply distinguished the elements necessary for liability in a case of slander and those required in a case of libel. There were a few rather clearly defined types of slander for which the plaintiff could, without any allegation or proof of special damages, have a verdict and thereby obtain damages and vindicate his good name. These were accurately described as "actionable per se." Quite naturally, such slander came to be called "slander per se." In contrast, other types of slander came to be known as "slander per quod." The fact that the slanderous statement was innocent on its face did not, however, prevent it from being "slander per se" if there were extrinsic facts, known to the recipient, that converted the seemingly innocent words into the type of defamation that was actionable per se. In common law pleading, these extrinsic facts were set forth in what was called the "inducement," while the "innuendo" portion of the declaration explained the defamatory meaning of the communication in the light of the extrinsic facts. The innuendo also had a second function: if the words on their face were ambiguous, so that the recipient might have construed them in either a defamatory or a nondefamatory sense, then even though no extrinsic facts were pleaded in the inducement, the pleader was required to set forth in the innuendo the defamatory meaning allegedly understood by the recipient. In the absence of such a pleaded defamatory meaning, the court would construe the ambiguous words in their nondefamatory sense, and the declaration was fatally defective. Still another function of the innuendo was to indicate how the defamatory communication applied to the plaintiff when the connection was not clear from the communication itself. In this situation the innuendo served as a complement to the "colloquium," which set forth the extrinsic facts identifying the plaintiff as the person to whom the remarks referred.

The failure of many judicial opinions to understand the various functions served by the innuendo in common law pleadings has produced some bad law. Courts have frequently stated that the meaning of the communication cannot be enlarged by the innuendo. The correct point is that the plaintiff cannot pull himself up by his own bootstraps. When the communication is unambiguous and no extrinsic facts are pleaded, there is no need to plead any innuendo; the words speak for themselves. The plaintiff in such a case cannot improve his position by pleading a strained and unnatural defamatory meaning. The court should properly rule that the words are not capable of a defamatory meaning and dismiss the complaint.

When it is recognized that the words "actionable per se" and "slander per se" are synonymous expressions describing the types of slander that are actionable without proof of special damages, there is no proper basis for using the words "per se" to modify libel because, unlike slander, all libel was actionable at common law without any proof of special damages.

ject to slander per se rules, so that recovery for libel will be permitted only if the plaintiff proves special damages or that the defamatory statement fits within one of the categories of slander per se.¹⁰

Even in jurisdictions that take the standard position on defamation law, confusion may result because of the use of different terms to describe similar results, or similar terms to describe dissimilar results. Courts may use the term “defamation per se” or “defamatory per se” alongside the term “actionable per se.” The term “defamatory per se” may describe defamation, whether libel or slander, that is clear on its face, so that no extrinsic facts are needed to convey the defamatory meaning. Sometimes, the term “actionable per se” is used to describe the same conclusion.” However, other courts may use the term “defamatory per se” to describe defamation that is clear on its face, leaving the term “actionable per se” to describe defamation that is actionable without proof of special damages.

The next section of this essay is an abbreviated discussion of the primary United States Supreme Court opinions that set the First Amendment standards for defamation cases and the Minnesota Supreme Court cases following them. The decisions have no direct bearing on how common law defamation claims are formatted, but they put defamation per se in context.

III. A SHORT CONSTITUTIONAL OVERLAY

In 1964, in *New York Times Co. v. Sullivan*,¹¹ the Supreme Court imposed limitations on common law defamation actions brought by public officials. The Court required proof of “actual malice” by clear and convincing evidence in order for a public official to re-

A few courts, however, used the term “libel per se” to describe a libel that is defamatory on its face. This description performed no useful function. On the contrary, it completely confused some courts, leading them to hold that if the communication was not defamatory on its face, it was not “libel per se,” and therefore was not actionable without proof of special damages. These courts not only disregarded the fact that proof of special damages was never required in libel cases at common law, but also completely overlooked the fact that there was an area of slander that was actionable without proof of special damages, even though the plaintiff had to allege and prove the extrinsic facts that gave the words their defamatory meaning.

Eldredge, 79 HARV. L. REV. 735-38 (citations omitted).

10. *E.g.*, *Van Horne v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998).

11. 376 U.S. 254 (1964).

cover presumed and punitive damages,¹² subject, of course, to any more rigid state law. The *Sullivan* rule was extended to public officials and, by a plurality of the court in 1971, to public issues.¹³ However, in 1974, in *Gertz v. Robert Welch, Inc.*,¹⁴ the Court held that private defamation plaintiffs involved in matters of public concern need only prove fault and actual damages in order to recover. Proof of actual malice would entitle private plaintiffs to presumed and punitive damages.

The Court's constitutional decisions have prompted occasional reevaluations of common law defamation law at the state level. The decisions have been a catalyst for change, typically through a tightening of the common law defamation rules, even absent a First Amendment mandate.

The Minnesota Supreme Court has been conventional in following the Supreme Court's constitutional decisions.¹⁵ In *Mahnke v. Northwest Publications, Inc.*,¹⁶ the court noted that it had actually been a forerunner in presaging *New York Times Co. v. Sullivan* in its liberal application of the fair comment privilege.

In 1977, in *Anderson v. Kammeier*,¹⁷ a case with no First Amendment implications, the court raised on its own the potential implications of *Gertz v. Robert Welch, Inc.* The court understood *Gertz* to apply to media defendants, but it also noted that some courts had applied the *Gertz* requirements of fault and actual injury in all defamation cases. The court noted that *Gertz* might have an impact on "the common law of private defamation in several areas, including pleading, privileges, and damages."¹⁸ However, because of the far-reaching consequences, the court left the issue to another case.

In the 1980 case of *Stuempges v. Parke, Davis & Co.*,¹⁹ the court rejected an argument that the *New York Times Co.* actual malice standard should apply to all defamation actions:

We agree that the New York Times "actual malice" stan-

12. The rule was extended quickly to public figures. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

13. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

14. 418 U.S. 323 (1974).

15. *E.g.*, *Jadwin v. Minneapolis Star and Trib. Co.*, 367 N.W.2d 476, 481 (1985); *Rose v. Koch*, 278 Minn. 235, 154 N.W.2d 409 (1967).

16. 280 Minn. 328, 336, 160 N.W.2d 1, 7 (1968).

17. 262 N.W.2d 366 (1977).

18. *Id.* at 372 n.5.

19. 297 N.W.2d 252 (Minn. 1980).

dard was fashioned as an exception to the common law rule to permit the printed and electronic media to perform their function of informing the public about newsworthy people and events without undue fear of defamation liability. Thus, its focus on the defendant's attitude toward the truth of what he has said rather than on his attitude toward the plaintiff is proper only when a media defendant is involved.²⁰

The court said that its conclusion resolved the issue it had left open in *Anderson*:

Since we believe that *Gertz*...applies only to media defendants, we see no reason to extend its holding that a court cannot award presumed or punitive damages without proof of actual malice to the circumstances of this case.²¹

The Minnesota Supreme Court transcended the *Gertz* requirements in *Richie v. Paramount Pictures Corp.*,²² in holding that a private defamation plaintiff suing a media defendant for defamation relating to a matter of public concern would be required to prove actual injury to reputation before being entitled to recover for emotional harm. The court noted that *Gertz* required actual injury, but not necessarily to reputation, to justify recovery. The court justified the more rigid Minnesota requirement based upon three factors. The first was the court's conclusion that the primary purpose of a defamation action is to compensate private persons for injury to reputation. The second was the "historical caution" with which the court has regarded emotional distress claims. The third was the court's rejection of the invasion of privacy tort, which is intended to compensate individuals for the emotional harm they suffer from being exposed to private view. The court noted that it had previously failed to recognize invasion of privacy claims, and that permitting recovery for emotional harm would be inconsistent with the court's rejection of privacy claims. Of course, three years later the supreme court adopted three branches of the tort of invasion of privacy in *Lake v. Wal-Mart Stores, Inc.*,²³ but the adoption of the privacy torts, while weakening the court's rationale, obviously does not mandate a reversal of the rule it announced in *Richie*.

While the constitutional decisions of the United States Su-

20. *Id.* at 258.

21. *Id.*

22. 544 N.W.2d 21 (Minn. 1996).

23. 582 N.W.2d 231, 235 (Minn. 1998). The court rejected the false light tort. *Id.*

preme Court have not precipitated significant changes in the common law of defamation in Minnesota, change may nonetheless have occurred, although obliquely, through mistake.

IV. THE COMMON LAW OF DEFAMATION IN MINNESOTA

Notwithstanding the ostensibly clear split in the treatment of libel and slander claims in Minnesota, at times the terminology used by the appellate courts creates the potential for confusion in determining just exactly what a plaintiff bringing a defamation claim must prove. In Minnesota, while the courts have not accepted the libel per se/libel per quod distinction, they have used the terms "defamatory per se," "defamation per se," or "actionable per se" in defamation cases. The use of those terms creates the potential for blurring the distinctions between libel and slander. In earlier cases the terms had a clear meaning in context. Courts might use the term "defamatory per se," but only after a clear conclusion that a particular statement fit within one of the common law categories of slander per se. However, in more recent decisions a crossover has occurred that burdens libel law with slander limitations through an apparently inaccurate use of the term "defamation per se."

The following discussion of a string of Minnesota cases illustrates the early treatment of libel and slander claims and later confirmation of the basic rules by the supreme court, and then pinpoints the deviation from that treatment.

In *Newell v. How*,²⁴ an 1883 case in which libelous statements were published concerning the plaintiff, a merchant, the court said:

In an action for libel, when the language published is not actionable per se, but requires explanation by some extrinsic matter to make it actionable, the complaint must allege such extrinsic matter which, coupled with the language published, affects its construction and shows that it conveys the actionable meaning which plaintiff claims for it...The publications in this case, which constitute the alleged libels, were regarding the plaintiff in the special capacity of merchant, and in reference to his financial standing and credit as such. In those trades or professions in which ordinarily credit is essential to their successful

24. 31 Minn. 235, 17 N.W. 383 (1883).

prosecution, language is actionable per se which imputes to one in such trade or profession a want of credit or responsibility, or insolvency, past, present, or future. Such language necessarily, or naturally and presumptively, causes pecuniary loss to the person of whom it was published.²⁵

The use of the term “actionable per se,” means that the libel has to be explained by putting it in context against extrinsic facts that will reveal the defamatory meaning. The libels in the case, which naturally or presumptively caused damage to the plaintiff, were actionable because they were obvious, not because they fit within one of the slander per se categories.

In *Byram v. Aikin*,²⁶ in 1896, Justice Mitchell viewed all libel as actionable without proof of special damages:

Written publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous although they involve no imputation of crime, and are actionable without any allegation of special damages.²⁷

Thirty years later, in *Ten Broeck v. Journal Printing Co.*,²⁸ the su-

25. *Id.* at 236, 17 N.W. at 383.

26. 65 Minn. 87, 67 N.W. 807 (1896).

27. *Id.* at 87, 67 N.W. at 808.

28. 166 Minn. 173, 207 N.W. 497 (1926). There are other intervening cases illustrating the point. *E.g.*, *Trebbly v. Transcript Pub. Co.*, 74 Minn. 84, 88, 76 N.W. 961, 961 (1898) (in action for libel the court held that the statement was libelous on its face because “[i]t was clearly calculated to injure plaintiff in the good opinion and respect of others, and expose him to the contempt and hatred of his neighbors...”); *Earle v. Johnson*, 81 Minn. 472, 474, 84 N.W. 332, 333 (1900) (in an action for slander, the plaintiff was charged with the commission of a crime; the supreme court affirmed a verdict for the plaintiff, stating that “[i]t is hardly necessary to say that defamatory words false spoken of a person, which accuse him of the commission of a crime, are actionable per se...”); *Alwin v. Liesch*, 86 Minn. 281, 284, 90 N.W. 404, 405 (1902) (in a libel action the issue was whether the trial court erred in refusing to instruct the jury that a newspaper article lampooning the plaintiff was libelous on its face. The supreme court held that it was: “There can be no question but that the article complained of is libelous on its face. The law on this subject is that any written or printed words are actionable per se which tend to injure the reputation or good standing of a person, and thereby expose him to public hatred, contempt, and ridicule, or which tend to degrade him in society, lessen him in public esteem, or lower him in the confidence of the community, even though the words do not impute the commission of a crime or immoral conduct.”); *Davis v. Hamilton*, 88 Minn. 64, 92 N.W. 512 (1902) (libel action for a newspaper article charging the plaintiff with persistent violation of the law. In the second appeal, the defendant argued that the trial court erred in ex-

preme court was clearer in setting out its understanding of libel per se, in discussing a newspaper article that supposedly accused the plaintiff of running a brothel and abortion establishment:

It is too clear for much discussion that the article is not libelous per se. That is because its statements are not clearly defamatory on their face...

Words which, upon their face and without the aid of extrinsic proof are injurious, are libelous per se, but, if the injurious character of the words appear, not from their face in their usual and natural signification, but only in consequences of extrinsic circumstances, they are not libelous per se....²⁹

Any reading, casual or close, of the article in question, leads to the conclusion that every word may be true and yet every owner or tenant of the premises be innocent of crime or other wrong. If in fact it was libelous, it was not so because of the literal meaning of the language, but because of the interpretation put upon it by reason of some peculiar facts, wholly external to the publication itself, which gave it the sinis-

cluding evidence of the defendant's intent in publishing the defamatory matter. The court held that the defendant's intent was irrelevant in a case such as the one before the court where "the language of the article was unambiguous and actionable per se." *Id.* at 71, 92 N.W. at 515. Later, the court utilized slightly different terminology, in distinguishing *Marks v. Baker*, 28 Minn. 162, 9 N.W. 678 (1881), a case cited by the defendant where the defamatory statement was "not upon its face actionable per se," by saying that the rule there "can have no application in cases like that at bar, where the libelous article is actionable upon its face; charging, as it does, open and persistent violations of the law." *Id.* at 71-72, 92 N.W. at 515. It is clear that in using the term "actionable per se" the court is referring to the clarity of the libel, rather than the fact that it fits within a slander per se category.); *Sharpe v. Larson*, 67 Minn. 428, 431-32, 70 N.W. 1, 1 (1897) (the court understood libel per se to mean the following: "A publication which imputes to one holding an office improper conduct therein, or to an attorney at law professional misconduct, is libelous per se. It is not necessary that the person libeled should at the time of the publication still hold the office. . . If the publication is obviously defamatory, it is the duty of the trial judge, in a civil action, to direct the jury, as a matter of law, that it is a libel per se, and that they must find for the plaintiff...The defendant in such a case cannot be heard to say that he did not intend by the publication to injure the plaintiff. But, where the publication is reasonably susceptible of a defamatory meaning, as well as an innocent one, according to the occasion and circumstances of the publication, the question whether it is libelous is one for the jury.").

29. *Pratt v. Pioneer Press*, 30 Minn. 41, 14 N.W. 62 (1882), citing *Fry v. McCord*, 33 S. W. 568, 570 (Tenn. 1895); *Newell on Defamation*, §§ 34, 35.

ter meaning complained of.³⁰

If the language of the publication is not actionable per se, the court held, that the plaintiff must explain the defamatory meaning by alleging extrinsic facts that illustrate the defamatory meaning.³¹ It did not mean that the plaintiff had to prove special damages, however. The supreme court had the same understanding almost sixty years later in *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*³² a business libel case in which the court decisively rejected any distinction between libel per se and libel per quod:

Courts at common law presumed damages from any libel...The commentators, including Dean Prosser, appear to agree that this remains the rule in Minnesota, even though they disagree about whether the competing rule of "libel per quod" even exists as settled legal doctrine....

Under Minnesota's common law approach...the phrase "libel per se" refers to statements that are defamatory as a matter of law. These terms are not used to distinguish libel "per se" that is actionable without proof of special damages from libel "per quod" that is not.³³

In other words, Minnesota has never adopted the libel per se, libel per quod distinction, in which proof of special damages is required where the libel is not clear on the face of the publication. The rule is that damages are presumed from any libel.

V. AN EQUIVOCAL SIGNAL?

The foundation for the deviation from the basic rules seems to have begun in 1965 in *Loftsgaarden v. Reiling*,³⁴ a libel action in which the jury returned a plaintiff's verdict of no compensatory damages but \$5,000 for punitive damages, after the trial court had ruled that the publication was libelous per se. The supreme court held that "in actions for libel per se punitive damages are recoverable without proof of actual damage."³⁵ The court's statement is accurate. There is no discussion of slander or of "defamation per

30. *Ten Broeck*, 166 Minn. at 174-75, 207 N.W. at 497.

31. *Ten Broeck*, 166 Minn. at 176, 207 N.W. at 498.

32. 352 N.W.2d 1 (Minn. 1984)

33. *Id.* at 9.

34. 267 Minn. 181, 126 N.W.2d 154 (1964), *cert. denied*, 379 U.S. 854 (1964).

35. *Id.* 267 Minn. at 183, 126 N.W.2d at 155 (citing, *inter alia*, *Clark v. McClurg*, 9 P.2d 505 (Cal. 1932), a California Supreme Court case in which California viewed libel per se as libel that is actionable on its face).

se.”

In *Anderson v. Kammeier*,³⁶ a 1977 slander case in which the defendant made certain statements about the plaintiff, who was a businessman, including that he was a “draft dodger,” “should not be trusted,” and that he would “stab anyone in the back,”³⁷ the court concluded that the “draft dodger” statement could be taken by a reasonable person to mean that the plaintiff violated the Selective Service laws. The court also noted that the other terms constituted slander per se “because they affect Anderson’s business, trade, or profession.”³⁸

The trial court in the case found that the plaintiffs did not suffer pecuniary loss because of the slanderous remarks, but nonetheless awarded the plaintiffs \$1,000 in punitive damages. At the conclusion of the opinion, the court also said that “[w]hen words are defamatory per se...punitive damages are recoverable without proof of actual damages.”³⁹ The pedigree for the statement was the court’s decision in *Loftsgaarden*, a libel case, remember, in which the court said that in cases involving “libel per se punitive damages are recoverable without proof of actual damage.”⁴⁰ The *Anderson* court, in using the term “defamatory per se,” simply lumped libel and slander per se claims together to establish the proposition that where the defamatory statements are actionable without proof of special or actual damages, punitive damages may be awarded. It seems obvious from the *Anderson* opinion that the court did not intend to in any way let libel cases be governed by slander per se principles.

In *Stuempges v. Parke, Davis & Co.*,⁴¹ in 1980, the plaintiff sued a former employer for slanderous statements made by the employer in an employment recommendation. In discussing the implications of a finding of slander per se the court seemed to mix concepts, however: “Because the false statements uttered by Jones to Hammer are slanders per se as defamations of one’s business reputation, general damages are presumed...”⁴²

So far, so good. The court went on to say that: “[i]t is also firmly established in Minnesota that punitive damages can be

36. 262 N.W.2d 366, 372 (Minn. 1977).

37. *Id.* at 372.

38. *Id.*

39. *Id.*

40. *Loftsgaarden*, 267 Minn. at 183, 126 N.W.2d at 155.

41. 297 N.W.2d 252 (Minn. 1980).

42. *Id.* at 259.

awarded in cases of defamation per se without proof of actual damage to the plaintiff.”⁴³

In support of this statement the court cited *Anderson v. Kammeier*,⁴⁴ and *Loftsgaarden v. Reiling*.⁴⁵ Taken together, the cases in no way deviate from the established common law rule. Defamation per se, which includes libel and slander, refers to statements that are actionable per se, which in libel cases means clear on the face of the publication and in slander that the statement fits into a slander per se category. The result is that damages are presumed.

Had the appellate courts continued to follow *Advanced Training Systems*, there would have been no problem. They did not.

In *Frankson v. Design Space Internat'l*,⁴⁶ a libel case that arose out of an adverse termination letter, the court of appeals characterized a defamation claim that affected the plaintiff in his “business, trade, profession, office or calling” as “defamation per se,” that is “actionable without any proof of actual damages.”⁴⁷ The court said that general damages are presumed in such cases, “without the sometimes impossible demonstration of actual damage.”⁴⁸ The court of appeals cited the supreme court’s decision in *Stuempges* in support of that statement.

The court’s statement is susceptible of two meanings. It may be that a defamatory statement that so clearly injures the plaintiff in his business or profession is actionable as a matter of law,⁴⁹ or, conversely, that if the defamatory statement did not fit into one of the slander per se categories, the plaintiff would have been unable to recover, even though his claim was for libel. However, given the facts of the case, it would have made no difference to the plaintiff whether libel or slander rules applied, because of the clearly defamatory nature of the communication.

Becker v. Alloy Hardfacing & Engineering Co.,⁵⁰ was a defamation suit brought by a former employee against the company that em-

43. *Id.*

44. 262 N.W.2d 366, 372 (Minn. 1977).

45. 267 Minn. 181, 126 N.W.2d 154 (1964), *cert. denied*, 379 U.S. 854 (1965).

46. 380 N.W.2d 560 (Minn. Ct. App. 1986), *rev’d on other grounds*, 394 N.W.2d 140 (Minn. 1986).

47. 380 N.W.2d at 566.

48. *Id.* at 567.

49. That result would be consistent with other Minnesota cases. *E.g.*, *Sharpe v. Larson*, 67 Minn. 428, 432, 70 N.W. 1, 1 (1897) (“publication which imputes to one holding an office improper conduct therein, or to an attorney at law professional misconduct, is libelous per se.”).

50. 401 N.W.2d 655 (Minn. 1987).

ployed him. The plaintiff's defamation claim was based on a stolen car report the defendants filed with the police and a letter to the plaintiff's subsequent employer that accused the plaintiff of keeping certain confidential property of the defendants. The jury in its answers to the special verdict questions in the case found both statements to be false. The defamation case therefore seems to be a combination of libel and slander claims. The supreme court's discussion of the defamation claims is as follows:

Appellants argue that this court should abolish the rule that where defendant commits libel per se, general and punitive damages are recoverable without proof of actual damages. (Citing *Loftsgaarden*)...We decline to do so. Among those types of actions which are defamatory per se are false accusations of committing a crime and false statements about a person's business, trade, or professional conduct. (Citing *Anderson*).

Recent commentators have suggested that some showing of harm to reputation, either by inference or direct evidence, should be required before allowing recovery of damages...Appellants have failed to convince us that we should overrule long-established precedent in favor of a new rule. We reaffirm the rule that where a defendant's statements are defamatory per se, general damages are presumed.⁵¹

In *Becker*, it made no difference whether the claims were governed by libel or slander rules because even if the slander rules had been applied, both statements would have fit slander per se categories. It is possible, then, that the court, in using the term "defamatory per se" could have meant that the libel was actionable per se because its earlier cases indicated that statements affecting a person's business reputation that are clear on the face of the publication are actionable as a matter of law, and that the accusation of the crime would be slander per se. Together, the concepts could then lumped together with the conclusion that the statements were "defamatory per se." The troublesome aspect of the opinion, however, is the potential for confusion that results from a mix of slander and libel principles that could permit the conclusion in subsequent cases that "defamation per se" means only defamation that falls into the categories of slander per se, irrespective of whether the plaintiff's claim is for libel or slander.

51. *Id.* at 661 (citations omitted).

More recently, in *Richie v. Paramount Pictures Corp.*,⁵² a libel case, the supreme court continued to mix the terms: “[I]n cases of defamation per se, the common law allowed harm to reputation to be presumed.”⁵³ The court’s authority was the *Becker* case.

In footnote 3, the court noted that Prosser and Keeton define defamation per se to be “actionable without the necessity of pleading and proving that the plaintiff had suffered any impairment of his reputation or other harm as a result. In other words, the existence of damage [is] conclusively presumed or assumed from the publication of the libel itself, without any evidence to show actual harm of any kind.”⁵⁴

Then, the footnote juxtaposed *Becker*, which said that “Among those types of actions which are defamatory per se are false accusations of committing a crime,” and several sections of the Restatement (Second) of Torts,⁵⁵ which set out the conventional view of defamation law. The court of appeals in *Richie*, although it was reversed on other grounds, had taken the same position in its opinion:

Defamation law has long recognized that certain types of defamatory statements are actionable per se without proof of special damages. W. Page Keeton, et al., Prosser & Keeton on Torts § 112 (5th ed. 1984). In cases involving such defamatory per se statements, damage to reputation is presumed, and compensatory damages can be awarded on this basis. (Citing *Becker*). Under both types of defamation (libel and slander) recognized by the common law, statements imputing to another the commission of a crime—particularly one involving moral turpitude—or serious sexual misconduct constitute defamation per se.⁵⁶

In fact, Prosser and Keeton do not use the term “defamation per se” in the way it is noted in footnote 3 of the supreme court’s opinion in *Richie*. The quote, in proper context, reads as follows:

Any defamatory imputation may, of course, be conveyed in libelous form. By the beginning of the nineteenth cen-

52. 544 N.W.2d 21 (Minn. 1996).

53. *Id.* at 25.

54. *Id.* at 25 n.3.

55. RESTATEMENT (SECOND) OF TORTS §§ 559-570 (1977).

56. 532 N.W.2d 235, 239-40 (Minn. Ct. App. 1995), *rev’d on other grounds*, 544 N.W.2d 21 (Minn. 1996).

ture, it was well-established that any libel, as distinct from the same imputation in the form of slander, was actionable per se, meaning that it was actionable without the necessity of pleading and proving that the plaintiff had suffered any impairment of his reputation or other harm as a result. In other words, the existence of damage was conclusively presumed or assumed from the publication of the libel itself, without any evidence to show actual harm of any kind.⁵⁷

The quote in footnote 3 in the supreme court's opinion substituted the term "defamation per se" for libel, and then tied libel law to slander principles by the reference to *Becker*. Of course, the cited Restatement sections establish the opposite principle in clearly separating libel and slander rules, so perhaps the court intended after all to retain the rule that all libels are actionable without proof of special damages. The conclusion still could be reached, both from the court of appeals and supreme court opinions, that defamation per se exists when any libel or slander fits within one of the four categories of slander per se, but without the converse conclusion that libels are not actionable per se unless they do. It made no difference in *Richie*, however, because the supreme court concluded that the plaintiff was unable to establish actual injury to reputation that would have supported the claim for emotional harm.

Perhaps because of the frequency with which the term "defamation per se" appears in appellate opinions, and its increasing familiarity, defamation per se claims now commonly appear in complaints next to claims for defamation and intentional or negligent infliction of emotional distress.⁵⁸ Although the result may not have been intended, the foundation for the use of slander per se as a description not just of one kind of libel per se, but the only kind, has been established.

VI. A WRONG TURN?

The following discussion illustrates four misuses of the term in

57. W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 112, at 795 (5th ed. 1984).

58. *E.g.*, *Fieno v. State*, 567 N.W.2d 739 (Minn. Ct. App. 1997) (concerning plaintiff, who was terminated from her position at a community college, sued the Dean who discharged her for defamation per se based on an unfavorable written performance evaluation; the case was disposed of on other grounds).

recent Minnesota Court of Appeals decisions, two of which may have resulted in different outcomes on appeal, irrespective of whether or not the plaintiffs would eventually have won at trial.

The first case is *Friederichs v. Kinney & Lange, P.A.*,⁵⁹ an unpublished decision involving a lawsuit arising out of the discharge of a shareholder from his position in Kinney & Lange. The defamation per se claim arose as a counterclaim against the plaintiff. It was a libel claim. The plaintiff argued on appeal that the trial court erred in finding that a letter he had written to a firm client was defamatory per se because the statements did not rise to the level of "gross, culpable neglect." The court of appeals disagreed, concluding that the statements in the letter "went directly to the heart of the firm's professional capability and reputation."

The plaintiff also argued that the damages of \$30,000 awarded on the libel counterclaim were excessive because the law firm did not lose the client and was unable to establish specific damages because of the letter. The court of appeals again disagreed: "because the statements made by [plaintiff] were defamatory per se, damages are presumed...The damage award is not manifestly or palpably contrary to the evidence, and we decline to set it aside."⁶⁰

Because the damages constituted defamation per se, the plaintiff did not have to prove special damages. That raises the issue of whether the defendant would have been entitled to recover on the defamation counterclaim had the statement not fallen into one of the common law categories of slander per se. In the alternative, it is possible that in using the term "defamatory per se," the court simply meant that the defamation, a libel, was actionable as a matter of law because it went so directly to the firm's professional reputation. If that is the understanding, there is no problem with the use of the term.⁶¹

The second is *Gillson v. State Department of Natural Resources*,⁶² a sexual harassment suit brought by a state employee against the state, the agency where she worked, and her supervisor. The defamation issue arose when the supervisor made a counterclaim for defamation against the plaintiff based on a letter the plaintiff sent to two agency supervisors with the intent of dispelling rumors that

59. 1997 WL 89147 (Minn. Ct. App. 1997), *rev. denied* (Minn. May 28, 1997).

60. *Id.* at 3.

61. *Sharpe v. Larson*, 67 Minn. 428, 431, 70 N.W. 1, 1 (1997) would justify that conclusion.

62. 492 N.W.2d 835 (Minn. Ct. App. 1993), *rev. denied* (Minn. Jan. 28, 1993).

were circulating about her. There were apparently three defamatory statements in the letter. Two were dismissed because they were true. The third statement, "that the readers should ask themselves if they would want a female relative to spend the night with Casey [the supervisor]" was held not to be "defamation per se and Casey did not prove damages."⁶³ The court of appeals specifically cited *Stuempges* for that proposition that the plaintiff "must prove actual damages if [the] statement is not defamation per se."⁶⁴

The defamation claim is clearly a libel claim, because it is based on a letter. Because it is a libel, damages should have been presumed. The plaintiff should not have been required to prove actual damages. The misapplication of *Stuempges*, which was a slander case, resulted in a dismissal of the plaintiff's libel case that was not justified, at least on that basis.

The third case is *Steele v. Tell*,⁶⁵ an unpublished court of appeals decision. The court applied the new defamation per se principles to defeat recovery in a libel case in which the plaintiff, a candidate for the legislature, alleged that he was defamed in a newspaper article stating that he was a suspect in a criminal sexual misconduct investigation. The plaintiff's defamation claim faltered on several grounds. First, the statement was true. Second, the court held that even assuming falsity of the article, the plaintiff, a public figure, was unable to show that the defendants acted with actual malice. Third, the plaintiff failed to make a timely demand for a retraction and did not make a showing of any special damages. The court's discussion of defamation per se then arose in the context of the appellant's (plaintiff's) argument that general damages should have been presumed because the statement was "defamation per se." The court disagreed:

Appellant contends that general damages are presumed because respondents' statement constituted defamation per se. See *Becker v. Alloy Hardfacing & Engineering*... (where statements are defamatory per se, general damages are presumed). We disagree. The News Line article did not false accuse appellant of committing criminal sexual conduct; nor did the statement concern appellant's business or professional conduct... See *id.* (false accusations of committing a crime and false statements about a

63. *Id.* at 843.

64. *Id.*

65. No. C2-94-981, 1994 WL 593924 (Minn. Ct. App. Nov. 1, 1994).

person's business, trade, or professional conduct are defamatory per se). It merely stated that appellant's personal conduct was still under investigation, which it was.⁶⁶

The court seemed to tightly tie libel law to two of the slander per se categories. Of course, the issue is why the defamation per se concept is relevant in the first place. The plaintiff must have argued that defamation per se principles should apply to permit recovery of presumed damages, notwithstanding other potential flaws in his claim, including the failure to make a timely demand for a retraction and the constitutional limitations on recovery interposed by the plaintiff's public figure status under *New York Times Co. v. Sullivan*.⁶⁷ Meeting the *New York Times Co.* actual malice standard would justify presumed damages in a libel case. However, a plaintiff who is unable to meet that standard would under no circumstances be permitted to recover, even with a showing of "defamation per se," because the First Amendment baseline established by the Supreme Court in *New York Times Co.* would be impermissibly reduced. The difficulty with *Steele* is that it suggests that libel is actionable per se *only* if it fits into the slander per se categories.

The fourth decision is *Foley v. Hennepin County*,⁶⁸ a case involving both the oral and written communication of damaging information by Hennepin County social workers to the plaintiff's ex-husband and parents and therapist. The court of appeals concluded that the challenged statements (that plaintiff was mentally unstable, interested in pornography and the occult, and was involved in a lesbian relationship) were not defamatory per se. The court cited *Richie* for the proposition that defamation per se includes false accusation of committing crime, about a person's trade, business, or professional conduct, or imputing serious sexual misconduct to the person, and then concluded that "Foley must thus demonstrate actual harm to her reputation in order to recover for humiliation and emotional distress..."⁶⁹

There were both oral and written communications in *Foley*, but the defamation per se concept was applied to both. The plaintiff, who had clearly alleged libel along with slander claims, was denied the right to proceed with the libel claim because it was not "defamatory per se," and the plaintiff was unable to show actual harm

66. *Id.* at *3.

67. 376 U.S. 254 (1964).

68. No. C1-97-2056, 1998 WL 313546 (Minn. Ct. App. June 16, 1998).

69. *Id.* at *2.

to her reputation, although she should not have been required to make such a showing in order to advance her libel claim. The mixing of libel and slander concepts that began in *Lofstgaarden* and has been perpetuated through *Richie*, resulted in a mistaken application of slander principles to bar a libel claim that did not fit into one of the categories of slander per se.

To highlight what happened in cases such as *Gillson* and *Foley*, what follows is a short statement of the overt reasoning process that a court would have to engage in to reach those results. Having due regard for the history of defamation law in Minnesota, it would have to look something like this:

1. In Minnesota, libel has historically been actionable without proof of special damage. Damages are presumed, at least in cases that do not involve public figures, officials, or issues.
2. Libel is actionable and damages are presumed even if the defamatory meaning is not apparent on the face of the publication. The term "per se" has been used in libel cases to refer to libels that are clear on their face or are libelous as a matter of law.
3. Slander is actionable per se if it falls in one of the four categories of slander per se.
4. We specifically hold that libel will now be governed by the common law categories of slander per se, and that a plaintiff suing for libel will not be entitled to recover presumed damages unless the defamatory statement falls into one of the categories of slander per se.
5. We will call the defamation claim "defamation per se."

VII. IS THE RULE JUSTIFIED?

The primary justification for a defamation per se rule that requires libel claimants to prove that libelous statements fit within the slander per se categories, absent proof of special damages, would have to be based on the need to simply limit private defamation claims, because of potential abuses of those claims. With limited exceptions that are the result of First Amendment limitations or related policy extensions, the Minnesota Supreme Court has left private defamation law untouched.

Following *Gertz*, the supreme court in *Jadwin v. Minneapolis Star and Tribune Co.*, limited the ability of private persons who are in-

volved in public issues for defamatory statements published by media defendants by extending to recover the *Gertz* rule requiring proof of fault and actual injury to private plaintiffs involved in public issues,⁷⁰ and in *Richie v. Paramount Pictures Corp.*,⁷¹ in holding that emotional damages are not recoverable in those cases absent harm to reputation.

In *Stuempges v. Parke, Davis & Co.*,⁷² the Minnesota Supreme Court rejected an argument that the *New York Times Co.* actual malice standard should apply to all defamation actions:

We agree that the New York Times "actual malice" standard was fashioned as an exception to the common law rule to permit the printed and electronic media to perform their function of informing the public about newsworthy people and events without undue fear of defamation liability. Thus, its focus on the defendant's attitude toward the truth of what he has said rather than on his attitude toward the plaintiff is proper only when a media defendant is involved.⁷³

70. 367 N.W.2d 476 (Minn. 1985). The court balanced the interests of both the media and private interest in personal reputation in explaining its decision.

If the media's right and obligation to freely investigate and report the news were the only compelling interest at stake in libel actions brought by private individuals we would, without question, adopt the strict standards of fault set forth in *New York Times* and *Rosenbloom*. We must, however, carefully weigh in the balance, as did the *Gertz* court, the "strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation."...Throughout history, personal reputation has been cherished as important and highly worthy of protection. As *Gertz* stressed, private individuals ordinarily have little or no media access to rebut alleged libelous charges and, unlike public officials or figures, have not assumed the risk of public media comment...They are "not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery."...Given that such an individual's sole means to vindicate his or her reputation may be judicial determination that the injurious statement is in fact false, to foreclose that redress by adopting the actual malice standard seems to us to go too far in extinguishing the only protection a private individual may invoke. We further note that the line we draw today with respect to the determination of private figure status of corporations reduces to some extent our concern for the chilling effect that rejecting the actual malice test may occasion.

Id. at 491. The rule would likely extend to private defendants who speak out on public issues that implicate the plaintiff. *Culliton v. Mize*, 403 N.W.2d 853, 856 (Minn. Ct. App. 1987).

71. 544 N.W.2d 21, 28 (1996).

72. 297 N.W.2d 252 (Minn. 1980).

73. *Id.* at 258.

And in *Becker v. Alloy Hardfacing & Engineering Co.*,⁷⁴ the supreme court rejected the defendant's argument that *Loftsgaarden*, which permitted presumed and punitive damages in private libel cases, should be rejected and that actual damages should be required. The court simply stated that the defendants "have failed to convince us that we should overrule long-established precedent in favor of a new rule."⁷⁵

That leaves defamation law involving private persons and private (non-public) issues as it stood before *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* However, if the concept of defamation per se that has emerged in the court of appeals decisions is now part of Minnesota defamation law, it would apply to libel actions covered by both *Gertz* and *New York Times Co. v. Sullivan*, and would impose a further limitation that would require either proof of special damage or that the defamatory statement falls within one of the slander per se categories in order for the plaintiff to recover presumed damages or actual damages, depending on the applicable constitutional rule.

VIII. CONCLUSION

The Minnesota Supreme Court was quite clear, quite early, that libel and slander are subject to separate rules. Libel is actionable without proof of special damages. Although libels are sometimes actionable per se, that means that the libels are clear on their face or actionable as a matter of law. Damages are presumed in libel cases. Slander is actionable and damages are presumed only if the defamatory statement falls within one of four categories of slander per se or if the plaintiff proves special damages. The only pronounced shift in Minnesota defamation law occurred in the aftermath of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.*, when the United States Supreme Court established First Amendment baselines for defamation actions brought by public officials or figures or private persons involved in public issues.

The requirements that public figures and officials meet the *New York Times Co.* actual malice standard to recover presumed and punitive damages, and the *Gertz* requirement that private persons involved in public issues prove fault and actual injury were confined by the Minnesota Supreme Court to public figure and offi-

74. 401 N.W.2d 655 (Minn. 1987).

75. *Id.* at 661.

cial, and public issue cases. In *Richie*, the court required a defamation plaintiff to prove actual injury to reputation before she would be entitled to recover damages for emotional harm, not because of constitutional constraints, but because of concerns about permitting defamation cases becoming a primary vehicle for the recovery of damages for emotional harm. Otherwise, the Minnesota Supreme Court has made a conscious decision to leave private defamation cases (private plaintiff, no public issue, and non-media defendant) untouched.

However, after the United States Supreme Court's First Amendment decisions, but not because of them, the "defamation per se" crept into Minnesota law, ultimately limiting the right of private plaintiffs to recover in libel cases.

The origin of the "defamation per se" limitation on libel cases is explainable as the result of misinterpretation of Minnesota Supreme Court cases from the 1970s through the 1990s that use the term "defamation per se" or "defamatory per se." In many of those cases the use of the terms is typically explainable as simply a substitute for slander per se, without the intent to suggest that libel claims should be subjected to the slander limitations. However, the use of a term, often repeated, may lead to misinterpretation, as more recent court of appeals decisions point out.

Defamation per se is not a separate defamation tort. If the term has meaning at all, it should be used with a clear understanding that it has different meanings in libel and slander cases. Its use in slander cases to refer to the "per se" cases where the plaintiff does not have to prove special damages in order to be entitled to presumed damages should not spill over into libel law. Absent that clear understanding, pleading defamation per se is a potential trap. Application in individual cases may be error, particularly in light of the clear understanding of the basic rules the supreme court has formulated to separately govern libel and slander.

The issue could be largely avoided, however, if the courts adopt a rule that requires defamation plaintiffs to prove actual damages⁷⁶ in all cases in order to recover, including private defama-

76. The consequences of adopting an actual damage rule for all defamation cases would likely be significant, particularly if the supreme court extended the *Richie* rule to all defamation claims. A rule requiring actual damage in defamation cases, without the *Richie* rule, would still require careful proof of all damages, including damages for emotional harm.

An earlier article surveying post-*Gertz* cases involving the actual damages issue suggests the following guidelines for proof:

The appropriate strategy for plaintiffs to prove actual damages in defamation cases...appears to require the plaintiff to prove three categories of damages: (1) damages for mental anguish, physical pain and suffering, and humiliation; (2) damages to reputation; and (3) special damages, such as lost earnings or diminished earning power. Appropriate witnesses might be: (1) the plaintiff—to testify regarding anxiety and concern, humiliation, physical pain and suffering, mental anguish, necessity of constantly denying libel or facing questions about it, fear of arrest, fear of social ostracism, frustration, lower job performance, inability to find new job at comparable salary, lost income, expenses of attempts to mitigate impact of libel, and major changes in life forced by libel; (2) family members—to testify regarding observations of plaintiff's mental and physical suffering and poor performance and the constant need to deny the libel; (3) fellow employees, associates, friends and neighbors—to testify regarding observations of plaintiff's mental and physical suffering and poor performance, awareness of constant rumors and discussion of libel behind plaintiff's back, and new doubts about the plaintiff; (4) doctor—to testify regarding medication and treatment provided for plaintiff's mental and physical suffering; (5) expert witnesses—to testify regarding diminished value of future earnings and the extent of the libel's dissemination; (6) strangers aware of libel—to testify regarding what they thought about plaintiff when they heard the libel.

T. Michael Mather, *Experience with Gertz "Actual Injury" in Defamation Cases*, 38 BAYLOR L. REV. 917, 939-40 (1986) (surveying cases, *id.* at 931-41 applying the actual damages requirement and suggesting appropriate strategies for plaintiffs seeking to prove those damages).

More recent cases bear out those suggestions. They also reveal an aggressive use of summary judgment in the disposition of defamation cases based on inadequate proof of damages. The Minnesota Supreme Court's experience in *Richie* is illustrative. The plaintiff in *Richie*, who was not a public figure or official, was caught up in a national television talk show's discussion of sexual abuse which, through the display of a picture of her and her goddaughter during the show created the inference that she was the parent's child and the one responsible for the abuse. The Minnesota Supreme Court concluded that *Gertz* applied, but that the plaintiff would not be entitled to recover damages for emotional harm unless she could prove actual injury to her reputation. The court of appeals in the case thought that the evidence was sufficient. Interestingly, the respondents in their brief in *Richie* conceded that harm to reputation did not have to be established as an essential element of a defamation claim in the case. The supreme court disagreed. The district court in the case concluded that the plaintiffs did not alleged facts showing that harm to their reputations occurred. The court of appeals concluded that the district court erred:

Here, appellants were wrongly and publicly labeled as a father who committed incest and a mother who stood by and let it happen. At least "some" actual injury to their reputations can be assumed from the seriousness of this false statement seen on national TV, at least enough to survive a motion for summary judgment. Common sense tells us that of the hundreds of thousands of possible viewers not all, as a matter of law, thought absolutely nothing ill of appellants, if only to a small degree. Appellants' burden at trial remains the same as the burden on all who claim damages. But we are viewing only a motion for summary judgment in which all factual disputes and inferences are to be resolved in appel-

lants' (the nonmovants') favor...

After hearing all of the evidence, a jury may conclude that appellants' reputations have not been damaged. But at this point we cannot. The specific evidence of injury offered by appellants in opposing summary judgment is not overwhelming. However, traditional defamation principles dictate our conclusion that at least for purposes of withstanding a motion for summary judgment, appellants have suffered at least some harm to reputation...

Richie, 532 N.W.2d at 240. The supreme court sided with the trial court, which had found that neither of the plaintiffs had suffered actual damage. The trial court's conclusions, included in the supreme court's opinion, were as follows:

Richie has lost no income as a result of the broadcast, and he has incurred no expenses to mitigate, correct or counteract the broadcast, aside from this suit. No one has indicated to him that they think less of him because of the broadcast. No one has indicated to Richie that they thought he was one of Denise Richie's parents or was involved actively or passively in Denise Richie's abuse. There has been no change in the behavior of those he regularly encounters as a Xerox service representative.

Richie, 544 N.W.2d at 26. The trial court's conclusions were similar with respect to Gerten:

In the more than one year between the broadcast and Gerten's deposition, only [two people, who knew the photos were a mistake] contacted her about the show; no one else has contacted her or told her they watched the show.

In addition, the show had no effect on her work. She has lost no income, incurred no expense, and taken no steps to mitigate, correct or counteract the broadcast, aside from this suit. No one has told Gerten they thought less of her because of the broadcast, and she can point to no specific facts demonstrating that her reputation has been affected. Finally, she has heard no rumors in her home community...as a result of the broadcast.

Id. at 26-27. The findings were based on deposition testimony of the plaintiffs. The court of appeals' decision is based on probabilities. More, however, is necessary to avoid summary judgment. The actual harm or actual injury requirement, while more restricted than the presumed damages standard, is not impossible to prove. There are various cases that point out the differences.

In *Rocci v. Ecole Secondaire Macdonald*, 755 A.2d 583 (N.J. 2000), the plaintiff, a schoolteacher, brought a defamation claim against the defendants based on a letter written by a co-teacher who accused the plaintiff of misconduct while acting as a chaperone on the trip on a school-sponsored international field trip. The trial court granted summary judgment for the defendants. The appellate division affirmed on the grounds that the plaintiff did not offer sufficient proof of reputational or pecuniary harm. The Supreme Court of New Jersey affirmed, although on different ground. The court held that the plaintiff, involved in a matter of public concern, was required to prove actual malice. The court also agreed that her proof of reputational or pecuniary harm was insufficient. In examining the sufficiency of the plaintiff's evidence to withstand the summary judgment motion, the supreme court first stated its view that "summary judgment is particularly appropriate for disposing of non-meritorious defamation suits." *Id.* at 588. The court's summary of her evidence was as follows:

In this case, plaintiff failed to allege any specific harm to her reputation; instead, she felt embarrassed each time her students teased her about

drinking alcohol. She was also concerned that others would find out about the letter, stating "you know how kids are." However, the students learned of the letter's contents only after plaintiff herself distributed the letter to them. In contrast, defendant sent the letter directly and privately to plaintiff's principal. As stated at her deposition, plaintiff's only claim of harm is embarrassment caused by her own distribution of the letter. Although we do not diminish the sense of embarrassment asserted by plaintiff, plaintiff should not be able to recover for that embarrassment when she herself caused the material to be distributed.

Moreover, plaintiff incurred no medical expenses for her alleged health problems and did not miss any work due to her asserted ailments. Apparently, plaintiff did not go to a gastroenterologist regarding her claimed digestive problems until the day before her deposition, well after she asserted in her complaint that she required "prolonged medical treatment." Likewise, plaintiff suffered no pecuniary harm—she did not lose her job, suffer any form of discipline, or miss any days of work. Plaintiff continued to be permitted to chaperone European trips and did not suffer any loss associated with any other job.

Id. at 588.

In *Jenkins v. Liberty Newspapers Limited Partnership*, 971 P.2d 1089 (Haw. 1999), the plaintiff, an attorney, brought suit against a newspaper that published an article in which he was mistakenly identified as the focus of investigation by the State Insurance Commissioner. The trial court granted summary judgment for the defendant and the plaintiff appealed. The supreme court affirmed the dismissal in part based on the plaintiff's failure to demonstrate actual injury to reputation as required by *Gertz*.

After evaluating the plaintiff's deposition testimony relating to damages, the court concluded that it was insufficient. The court noted that it has not previously addressed the issue of the "quantum of evidence of damages...necessary to sustain a defamation action against a motion for summary judgment," it observed that other courts had done so, including the Minnesota Supreme Court in *Richie*, and the New York Appellate Division in *Salomone v. MacMillan Publishing Co.*, 429 N.Y.S.2d 441 (N.Y. App. Div. 1980):

In the matter before us, Jenkins, like the plaintiffs in *Richie* and *Salomone*, reports only "three or four" inquiries from acquaintances regarding the newspaper article; he cannot name anyone whom he believes thinks less of him because of the erroneous publication. His deposition testimony is simply too vague to support a finding that he has suffered any actual damage to his reputation. His claim of injury to his business is equally speculative. Shortly after the story was published, Jenkins, of his own volition, left the Maui branch of a Honolulu law firm to form his own firm with another partner from his former firm. He testified that he was able to take with him all of the clients whom he expected to follow him to his new firm. He admitted during discovery that he could not think of a single client or matter that he had lost as the result of the alleged defamation. He offers only his "feeling" that he would have derived greater net earned income had the story not appeared.

Such "evidence" of business losses is not competent under general libel law. A libel plaintiff claiming loss of earnings must adduce admissible evidence that the defamation as a "material element or substantial cause" of actual economic damage...Jenkins, however, adduced no competent evidence that his small fledgling law firm would have generated the same

or similar net income as he had enjoyed at the Rush Moore law firm if the alleged defamation had not occurred. Accordingly, there being no factual basis, other than speculation, upon which a jury could have found that the alleged defamation was the legal cause of any claimed loss, we hold that the circuit court properly granted Liberty News's motion for summary judgment as to the negligence count of Jenkins's complaint...

Id. at 1103-04.

The New Jersey Supreme Court has applied the *New York Times* actual malice standard in cases involving matters of public concern, including the requirement that a plaintiff prove actual malice by clear and convincing evidence. The plaintiff must also prove actual damages, as *Rocci* points out. However, the court appears to have twisted its own precedent in searching for support that summary judgment standards should be liberally applied when viewing damages claims. The liberal use of summary judgment that is justified by the clear and convincing evidence standard does not apply in cases involving damages claims. Simply stated, *Costello* seems misapplied.

In *Moran v. State*, 985 P.2d 127 (Kan. 1999), the plaintiff brought a defamation suit against the various defendants, including individual defendants, who allegedly made defamatory statements about the plaintiff and his stewardship of the Kansas University Medical Center's heart transplant program. The trial court granted summary judgment for the defendants based on the basis that the plaintiff did not produce evidence that he had suffered injury to reputation. The Kansas Supreme Court reversed. The trial court's conclusions in the case were presented in the form of detailed findings, followed by a summary, which reads as follows:

All of plaintiff's testimony is couched in terms of what he believes he has suffered. Yet he can bring forward no one else who says that he has been approached less frequently about new employment positions, new transplant programs or authorizing or reviewing scholarly publications. Nor is there any evidence other than his own conjecture that he has been sued in medical malpractice cases or will be unable to obtain insurance in the future. Even if the court gives plaintiff the benefit of these facts based solely on plaintiff's opinion and finds that all of these things have occurred, there is still no evidence that evidence that any of defendants' statements caused these results. The record here contains other publications not attributable to defendants that contain information which one could construe as possibly damaging to plaintiff and, for that matter, to several other people involved with Kansas University Medical Center. The jury would have nothing but speculation before it on the question of whether it was defendants' statements rather than those of others that caused any of plaintiff's alleged damages.

Rev. Malewski, a chaplain at KUMC, testified that she had some concerns about plaintiff after the publications containing the alleged defamatory statements. In reading her testimony as a whole, however, it appears that her 'concerns' were the result of statements in the articles not made by any defendants. Add to that the fact that she would herself recommend plaintiff to head up a heart transplant program and her testimony fails to establish any damage to plaintiff's reputation as a result of defendants' statements.

Plaintiff also relies on testimony by Dr. Pingleton, another doctor on the KUMC staff. She stated that one of the letters containing the defendants' statements would cause anyone to be concerned about plaintiff's practice and that it was not a very flattering letter. Yet she also stated that

she had and has a high opinion of plaintiff as a clinician and nothing she has read has altered her perception of plaintiff relative to her own interactions with him about pulmonary and intensive care medicine patients. Nor did the statements in question alter her pattern of professional behavior vis a vis plaintiff nor is Dr. Pingleton aware of anyone else whose pattern of professional behavior was altered. This testimony simply does not indicate that plaintiff suffered a loss of reputation in the eyes of Dr. Pingleton or anyone else because of any statements of defendants.

It is undisputed that plaintiff has the same job now that he had just prior to publication of the statements in question. He is a professor of surgery at East Carolina University School of Medicine. He also is chief of the pediatric cardiothoracic surgical program, director of the surgical assistants, and in charge of recruitment for the division of cardiothoracic surgery.

Id. at 132.

The supreme court disagreed with the trial court's assessment of the plaintiff's evidence. While concluding that the evidence was "unquestionably thin," the court held that "when the evidence is viewed in a light most favorable to Moran and he is given the benefit of all inferences that reasonably may be drawn from it, a reasonable person might reach conclusions other than the one reached by the trial court." *Id.* at 133. The court then engaged in its own detailed analysis of the evidence to support its conclusion. While his own beliefs weren't given significant emphasis, the inferences that might be drawn from were. For example, the court said it would be "reasonable to infer a causal link between the decreased demand for his professional participation and the defendants' statements." *Id.* The remainder of the court's analysis was similar.

In evaluating the Malewski testimony, the court focused on the fact that she said in her testimony that she would recommend him to head a heart transplant program. Of course, as a clerical worker the court noted that her recommendation would be professionally meaningless. The trial judge concluded that her esteem for the plaintiff had not been diminished by the defendants' statements. The supreme court thought it "questionable whether the trial judge's view was a product of his resolving all facts and inferences in favor of Moran, as required." *Id.* at 134.

As to the Pingleton testimony, the supreme court noted the district court's conclusion that Moran's reputation had not suffered, but also that the district court "failed to distinguish between Moran's reputation for surgical and clinical skills and his reputation as the administrative head of a heart transplant program." *Id.*

Finally, while the district court emphasized the stability of the plaintiff's employment after the defendants published their defamatory statements, the supreme court said that "[w]hen viewed in the light most favorable to Moran...evidence of his employment status probably would be irrelevant to the question of harm to his reputation. The defendants' statements concerned his administration of a heart transplant program. Moran's subsequent employment was in pediatric cardiothoracic clinical practice." *Id.*

Moran is an interesting example of the evaluation of damages evidence in a defamation case involving a claim by a state official, where actual damage must be proved, and the issue is whether the claim survives summary judgment. The careful evaluation of the evidence is typical of cases involving those claims, but it is a reminder that the plaintiff is entitled to have favorable inferences drawn from his proof.

tion cases that are not subject to the Supreme Court's constitutional decisions. Any such decision would require a balancing of the relevant interests, including the long-standing common law interest in protecting reputation. The Minnesota Supreme Court has not yet made that decision. It seems unlikely that "defamation per se" would have obliquely crept into Minnesota law to provide a substitute limitation on the right to recover presumed damages in private defamation cases absent a clear announcement of the rule by the supreme court.

Individual comparisons of the results in summary judgment motions in defamation cases based on the inadequacy of the plaintiff's proof of damages illustrate not only the necessity of gathering relatively specific evidence on the sorts of damages that might be established to establish actual injury, but also potential differences in judicial attitudes toward the summary judgment motion in cases involving defamation claims where there are First Amendment limitations. A comparison of the Kansas Supreme Court's decision in *Moran* with the results in *Jenkins*, in Hawaii, or *Rocci*, in New Jersey, raises a question of whether summary judgment standards are applied too permissively in defamation cases, particularly those involving public issues, figures, or officials.
